



STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Antonia C. Novello, M.D., M.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner
August 23, 1999

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Kalimah Jenkins, Esq.
NYS Department of Health
Corning Tower – Room 2503
Empire State Plaza
Albany, New York 12237

Ross Jacoby, Esq.
230 Park Avenue
Suite 2240
New York, New York 10169

Alexander Jacoby, M.D.
230 Park Avenue
Suite 2240
New York, New York 10169

RE: In the Matter of Alexander Jacoby, M.D.

Dear Parties:

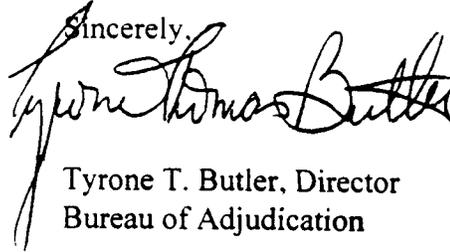
Enclosed please find the Determination and Order (No. 99-89) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt **or** seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified mail or in person** to:

Office of Professional Medical Conduct
New York State Department of Health
Hedley Park Place
433 River Street-Fourth Floor
Troy, New York 12180

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:mla
Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH
ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT

COPY

In the Matter of

A. Alexander Jacoby, MD. (Respondent)

Administrative Review Board (ARB)

A proceeding to review a Determination by a
Committee (Committee) from the Board for
Professional Medical Conduct (BPMC)

Determination and Order No. 99-89

Before ARB Members Grossman, Lynch, Shapiro, Price and Briber
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner):
For the Respondent:

Kalimah Jenkins, Esq.
Ross V. Jacoby, Esq.

After a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct by failing to comply with an agreement he entered into to aid his medical education and the Committee voted to revoke the Respondent's License to practice medicine in New York State (License). In this proceeding pursuant to N.Y. Pub. Health Law §230-c (4)(a) (McKinney's Supp. 1999), the Respondent asks the ARB to nullify or modify that Determination. The Respondent alleges that a bankruptcy order discharged the debt, that the Petitioner failed to follow legal mandates, that the Committee's Administrative Officer committed errors at the hearing and that the Committee imposed an excessive penalty. After considering the record and briefs from both parties, we affirm the Committee's Determination on the charges, although we amend certain items in the Determination. We reject the Respondent's procedural challenges, but we agree that the Committee imposed an excessively harsh penalty. We overturn the Committee, we vote to suspend the Respondent's License until he pays his debt or enters an arrangement to pay the debt and we place the Respondent on probation for three years following the suspension.

Committee Determination on the Charges

The Petitioner commenced the proceeding by filing charges with BPMC alleging that the Respondent violated N. Y. Educ. Law § 6530(42)(McKinney Supp. 1999) by failing to comply with an agreement he entered into to aid his medical education. The charges alleged that the Respondent failed to repay or to make arrangements to repay Two Hundred Thirteen Thousand Dollars (\$213,000.00) that the Respondent owes to Health Education Assistance Loans (a Federal Program), on loans to finance the Respondent's medical education. At hearing, the Respondent contended that a Utah Bankruptcy Court decision discharged the student loan debt. A BPMC Committee conducted the hearing into the charges and rendered the Determination now on review.

The Committee sustained the charge that the Respondent failed to comply with an agreement he entered into to aid his medical education. The Committee found that:

- the Respondent entered an agreement with the Federal Health Education Assistance Loans Agency to repay loans for his medical education in 1982,
- the agreement allowed a discharge in bankruptcy after five years from the loan's initiation,
- the Respondent received a discharge from his debts from the United States Bankruptcy Court in Utah,
- the Bankruptcy Court Order failed to discharge the Respondent's student loan debt,
- the Respondent admitted in a letter that the Bankruptcy Court Order failed to discharge his student loan debt, and,
- the United States Department of Justice (DOJ) has taken the position that the Respondent has failed to make any payments on his student loans.

The Committee found the actual debt amount the Respondent owed irrelevant. They found that the evidence clearly proved the Respondent in arrears for his entire student loan amount, plus interest. As a penalty for the misconduct, the Committee voted to revoke the Respondent's License. The Committee based the revocation on the Respondent's deliberate non-compliance with the Federal Regulation requiring that the Respondent repay the student loan debt. The Committee also found as disturbing, the Respondent's cavalier attitude about a debt affecting his License.

Review History and Issues

The Committee rendered their Determination on April 30, 1999. This proceeding commenced on May 17, 1999, when the ARB received the Respondent's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and the Petitioner's brief and response brief. The record closed when the ARB received the response brief on June 29, 1999.

The Respondent asks the ARB to either reverse the Committee's Determination on the charges or to reduce the penalty. The Respondent raised three issues on review.

1. The Petitioner failed to state a cause of action, because a.) a bankruptcy proceeding discharged the debt at issue in the charges and b.) because Health Department Investigator Christopher Morley entrapped the Respondent into writing a letter in which the Respondent admitted to still owing a debt on his medical school loans [Respondent Exhibit U].
2. The Petitioner failed to follow mandatory procedures a.) requiring that the Respondent have an opportunity for an interview to discuss the investigation into

his case. pursuant to N. Y. Pub. Health Law § 230(10)(a)(iii)(McKinney Supp. 1999) and b.) requiring that the Petitioner resolve this issue as an expedited proceeding pursuant to N. Y. Pub. Health Law § 230(10)(m)(McKinney Supp. 1999).

3. The Committee imposed an overly harsh penalty against someone with an unblemished record, who has suffered financial indigence. The Respondent argues that under N. Y. Educ. Law § 6509-b (McKinney Supp. 1999), failure by a physician to pay child or spousal support results only in License suspension.

The Respondent also alleges error by the Committee's Administrative Officer, due to her refusal to subpoena two witnesses for the Respondent, Health Department Investigator Christopher Morley and DOJ Agent Donna Lynch. Further the Respondent alleges that the Committee took testimony from a witness outside the presence of the Respondent or his attorney. The Respondent notes that the Committee's Determination, on the second page, lists as a Petitioner's Witness: "Ms. Lynch Morley, M.D." The Respondent contends that no such witness appeared at the hearing the Respondent attended.

The Petitioner's brief argues that the Respondent failed to acknowledge the serious charges against him, show remorse for his inaction in paying the debt and assure the Committee that the Respondent would make arrangements to pay the debt if the Committee allowed the Respondent to retain his License. The Petitioner argues that the ARB should allow the Committee's Determination to stand. In response to the Respondent's brief, the Petitioner:

- described possible testimony from Ms. Lynch or Mr. Morley as unnecessary,
- stated that the Department offered the Respondent a chance for an interview, but the Respondent failed to respond to the offer, and,

- surmised that the listing in the Committee's Determination for witness "Ms. Lynch Morley" resulted from an error in recording the decision.

The response brief asked the ARB once again to let the Committee's Determination stand.

Determination

The ARB has considered the record and the parties' briefs. We reject the Respondent's procedural challenges to the Committee's Determination. We sustain the Committee's Determination that the Respondent's failure to pay his student loan debt constituted professional misconduct, but we amend the Committee's Determination to correct several errors that appear in the Committee's findings and in the listing for witnesses. We overturn the Committee's Determination revoking the Respondent's License and we vote to suspend the Respondent's License and to place the Respondent on probation following the suspension.

Procedural Issues: We reject the Respondent's contention that the Petitioner failed to state a cause of action. The Respondent's argument, that the Bankruptcy Court discharged his student loan debt, merely raised a factual issue for the Committee's resolution. The Committee resolved that issue by finding the Respondent still owed the debt, despite the bankruptcy. The Committee based that finding on a letter from the United States Department of Justice (DOJ) that indicated that the Respondent continued to owe the debt [Petitioner Exhibit 6] and the Respondent's own letter admitting that the Bankruptcy Order failed to include the student loan debt [Respondent Exhibit U]. We also reject the Respondent's contention that Investigator Morley entrapped the Respondent into making the admission that appears in Exhibit U. In his testimony at the hearing, the Respondent indicated that Mr. Morley informed the Respondent that he should "negotiate something, anything" with DOJ, or the Respondent would face restrictions on his License, if an amicable solution could not be found [Hearing Transcripts pages

103-104.141]. At no point did the Respondent testify that Mr. Morley told the Respondent to admit the debt.

The Respondent also argued that the Petitioner failed to provide the Respondent an opportunity for an interview to discuss the investigation into his case, pursuant to N. Y. Pub. Health Law § 230(10)(a)(iii)(McKinney Supp. 1999). The Petitioner responded that the Respondent received an opportunity for an interview, but failed to respond to letters from the Petitioner offering the interview. The Respondent also failed to raise that issue in his answer to the charges [Respondent Exhibit A] or at the hearing, at which time the Committee's Administrative Officer could have reviewed the claim under Matter of Gupta v. DeBuono, 229 A.D.2d 58 (Third Dept. 1997). We find no reason to annul or remand the Determination on this ground, because the Respondent received no interview due to his own failure to answer the interview offer. We also see no prejudice to the Respondent in this case from his failure to undergo an interview. Under N. Y. Pub. Health Law § 230(10)(a)(iii)(McKinney Supp. 1999), the licensee receives an opportunity for an interview so he/she can receive an explanation about the issues under investigation. The Respondent's own testimony at hearing established that Investigator Morley spoke to the Respondent on several occasions by telephone. Investigator Morley informed the Respondent that Mr. Morley was investigating the Respondent's failure to pay his student loan debt and informed the Respondent that the failure to pay constituted misconduct, that could result in action against the Respondent's License. The only charge in this proceeding involved the failure to pay the student loan debt.

The Respondent argued further that the Petitioner violated procedures that mandated that the Petitioner proceed against the Respondent in an expedited procedure pursuant to N. Y. Pub. Health Law § 230(10)(m)(McKinney Supp. 1999). The provisions for such expedited proceedings provide that the Director of the Office for Professional Medical Conduct (Director) may resolve minor matters through such expedited procedures. Nothing in the statute requires the

Director to submit any matter to an expedited proceeding, including the failure to pay a student loan debt connected to a licensee's medical education.

The Respondent also alleged error due to the refusal by the Committee's Administrative officer to call two witnesses for the Respondent: DOJ Agent Donna Lynch and Health Department Investigator Christopher Morley. The Respondent's brief described the Administrative Officer's refusal as denying the Respondent the right to examine witnesses against him. We note that the evidence the Petitioner presented at hearing consisted of documents only and that neither Ms. Lynch nor Mr. Morley signed any of those documents. The Administrative Officer refused to allow any testimony into the investigation, because she found the only issue at the hearing involved whether the Respondent had paid the student loan debt. We agree and we refuse to remand for any testimony by those persons. In making our ruling on this issue, we gave no credence to the Petitioner's unsupported contention that the State lacked the authority to subpoena Ms. Lynch, a Federal employee. We note that a January 8, 1999 Letter to Petitioner's counsel [Petitioner Exhibit 6] indicated that DOJ would have provided Ms. Lynch to testify at the hearing.

The Respondent's final procedural issue alleged that the Committee took testimony outside the hearing from a witness "Ms. Lynch Morley, M.D." and that the Respondent received no opportunity to cross-examine that witness. The Petitioner argues that the listing for that witness must have resulted from an error in recording the Determination. After reviewing the Determination and the hearing record, we agree with the Petitioner that the listing must have resulted from an error. The only testimony in the record before the ARB came from the Respondent. The Committee's Determination contained eight findings of fact (FF). After all eight, the Committee listed in parenthesis thereafter the evidence that the Committee relied upon in making that FF. All eight FF cited to documentary evidence rather than testimony as their

basis. We see nothing in the record, therefore, to indicate that the Committee received any other testimony. The name "Lynch Morley" also appears to be the combination of the last names of the two witnesses that the Committee's Administrative Officer refused to call for the Respondent. We also note that other errors drafting errors appeared in the Determination. These factors lead the ARB to conclude that the listing resulted from an excusable drafting error rather than any improper conduct by the Committee. We discuss the errors in the Determination further below.

Errors in the Committee's Determination: In addition to the error in listing the witness, the Committee's Determination also contained errors in the FF. The ARB may substitute our judgment for that of the Committee, Matter of Bogdan v. Med. Conduct Bd. 195 Ad 2d 86, 606 NYS 2d 381 (Third Dept. 1993), Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 AD 2d 940, 613 NYS 2d 759 (Third Dept. 1994), Matter of Minielly v. Comm. of Health 222 AD 2d 750, 634 NYS 2d 856 (Third Dept. 1995). We elect to substitute our judgement in this case, by correcting the errors that appear in the Committee's Determination.

First, we amend the Committee's Determination to delete the listing for witness "Ms. Lynch Morley, M.D." As we concluded above that listing resulted from a likely drafting error. Next, the Committee's FF 5 stated:

" 5. On October 18, 1989, the Utah Bankruptcy Court granted the Respondent a discharge of his debts (Pet. Ex. 5)"

That FF constitutes a factual and drafting error by the Committee. Petitioner Exhibit 5 was a 1989 Default Judgement by the United States District Court that established that the Respondent Failed to pay the student loan debt. The Respondent's discharge in bankruptcy resulted from a 1996 Order From the United States Bankruptcy Court for the District of Utah [Respondent Exhibit B]. We amend FF 5 to read:

" 5. On May 28, 1996, the United States Bankruptcy Court for Utah granted the Respondent a discharge of his debts (Resp. Ex. B)."

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Finally, FF 7 states:

" 7. In a letter dated January 23, 1999, the Respondent admits that the student loan was not discharged (Resp. Ex. O) "

That FF contains a factual error and a drafting error in the reference to the evidence supporting the FF. Respondent Exhibit O is a Notice of Levy on Wages, Salary and other Income. The Respondent's Letter appears in the record as Respondent's Exhibit U and that letter bears the date January 23, 1998. We amend the FF to read:

"7. In a letter dated January 23, 1998, the Respondent admits that the student loan was not discharged (Resp. Ex. U)."

With these amendments and deletions to the Committee's Determination, we sustain the Committee's Determination that the Respondent's failure to pay the debt from his student loans constituted misconduct under N. Y. Educ. Law § 6530(42)(McKinney Supp.). We turn now to considering the appropriate sanction for the Respondent's misconduct.

Penalty: We agree with the Respondent that revocation constitutes an overly harsh penalty for the Respondent's failure to pay the student loan debt that he incurred to finance his medical education. The Respondent's misconduct reflected in no way on his ability to practice medicine. As the Respondent pointed out in his brief, under N. Y. Educ. Law § 6509-b (McKinney Supp. 1999), failure by a physician to pay child or spousal support results in an automatic License suspension. We conclude that a similar penalty would provide the appropriate sanction in this case. The Respondent incurred a debt to obtain his medical License, but he has failed to make any payments on that debt. The Respondent should settle that debt or enter into an arrangement with DOJ to satisfy that debt, before he returns to medical practice in this State.

The ARB votes unanimously to suspend the Respondent from practice until he pays his student loan debt or until he enters into an arrangement with DOJ to satisfy the debt. We vote further to place the Respondent on probation for three years, beginning at such time as the

Respondent pays the debt or enters into the arrangement. The Respondent's absence from the State or from medical practice in the State shall toll the probation, until the Respondent's return to the State and/or to practice. The full probation terms appear in the appendix to this Determination.

ORDER

NOW, with this Determination as our basis, the ARB renders the following **ORDER**:

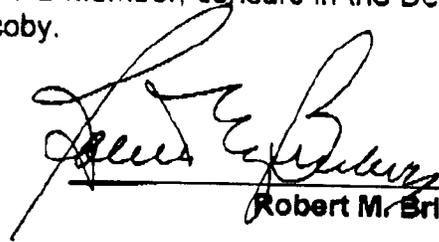
1. The ARB **AFFIRMS** the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB **OVERTURNS** the Committee's Determination to revoke the Respondent's License to practice medicine in New York State.
3. The ARB **SUSPENDS** the Respondent's License to practice in New York until such time as the Respondent pays his student loan or enters into an arrangement to pay the student loan and, the ARB places the Respondent on probation for three years following the suspension. The probation shall commence running at the time the Respondent returns to medical practice in New York State.

**Robert M. Briber
Sumner Shapiro
Winston S. Price, M.D.
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.**

In the Matter of A. Alexander Jacoby, M.D.

Robert M. Briber, an ARB Member, concurs in the Determination and
Order in the Matter of Dr. Jacoby.

Dated: August 10, 1999



Robert M. Briber

In the Matter of A. Alexander Jacoby, M.D

Sumner Shapiro, an ARB Member concurs in the
Determination and Order in the Matter of Dr. Jacoby.
Dated: August 4, 1999

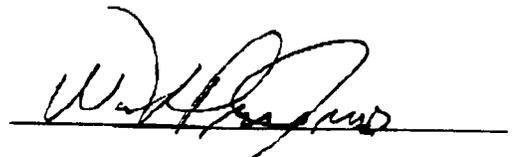
A handwritten signature in cursive script, appearing to read "Sumner Shapiro", is written over a horizontal line.

Sumner Shapiro

In the Matter of A. Alexander Jacoby, M.D.

Winston S. Price, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Jacoby.

Dated: 8/13, 1999

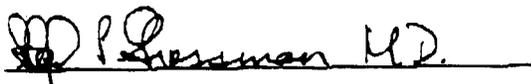


Winston S. Price, M.D.

In the Matter of A. Alexander Jacoby, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the Matter of Dr. Jacoby.

Dated: August 5, 1999

Handwritten signature of Stanley L. Grossman, M.D. in black ink, written over a horizontal line.

Stanley L Grossman, M.D.

In the Matter of A. Alexander Jacoby, M.D.

Therese G. Lynch, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Jacoby.

Dated: August 5, 1999

Therese Lynch M.D.

Therese G. Lynch, M.D.

APPENDIX

Terms of Probation

1. Respondent shall conduct himself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his profession.
2. Respondent shall submit written notification to the New York State Department of Health addressed to the Director, Office of Professional Medical Conduct (OPMC), 433 River St., 4th Floor, Troy, NY 12180; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.
3. Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of Respondent's compliance with the terms of this Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.
4. The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status. The period of

probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon Respondent's return to practice in New York State.

5. Respondent's professional performance may be reviewed by the Director of OPMC. This review may include, but shall not be limited to, a review of office records, patient records and/or hospital charts, interviews with or periodic visits with Respondent and his/her staff at practice locations or OPMC offices.

6. Respondent shall maintain legible and complete medical records which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.

7. Respondent shall comply with all terms, conditions, restrictions, limitations and penalties to which he or she is subject pursuant to the Order and shall assume and bear all costs related to compliance. Upon receipt of evidence of noncompliance with, or any violation of these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding and/or any such other proceeding against Respondent as may be authorized pursuant to the law.